

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

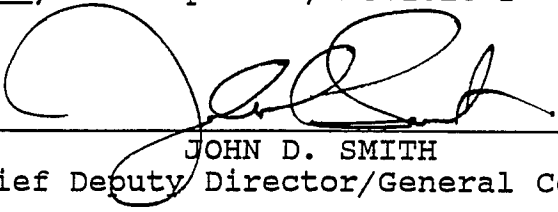
SACRAMENTO, CALIFORNIA

ENDORSED FILED  
IN THE OFFICE OF

FEB 1 4 35 PM 1989

In re: ) 1989 OAL Determination No. 2  
Request for Regulatory )  
Determination filed by ) MARCH FONG EU  
Donald W. Crisp concerning ) [Docket No. 88-904] OF STATE  
operations plans of ten ) OF CALIFORNIA  
Department of Corrections ) February 1, 1989  
institutions pertaining )  
to inmate grievance ) Determination Pursuant to  
procedures<sup>1</sup> ) Government Code Section  
11347.5; Title 1, California  
Code of Regulations,  
Chapter 1, Article 2

Determination by:

  
JOHN D. SMITH  
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney  
Bradley J. Norris, Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether operations plans issued by ten Department of Corrections institutions pertaining to inmate grievance (or "appeal") procedures are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

In a prior Determination, the Office of Administrative Law concluded that Chapter 7300 of the Department of Corrections' "Administrative Manual," which establishes statewide inmate grievance procedures, was a "regulation." Since each of the ten "local" institution operations plans concerning inmate grievance procedures substantially repeats and re-issues the regulatory provisions of Chapter 7300 of the Administrative Manual, the Office of Administrative Law concludes that the ten operations plans are "regulations," except for certain plan provisions that are either nonregulatory or are restatements of existing statutes, regulations, or case law.

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether operations plans issued by ten Department of Corrections ("Department") institutions, pertaining to inmate appeal procedures, are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).<sup>4</sup> The institutions and numbers of the operations plans in question (the "ten operations plans") are the following: Correctional Center - Northern/Coastal Camps, No. 317; Correctional Institution - Tehachapi, No. 250; Institution for Men - Chino, No. 45; Institution for Women - Frontera, No. 206; Mens Colony - San Luis Obispo, No. 28; State Prison - Kings County at Avenal, No. 36; Correctional Training Facility - Soledad, No. 36; Deuel Vocational Institution - Tracy, No. 2; Mule Creek State Prison - Ione, No. I-A-36; and Sierra Conservation Center - Jamestown, No. 036.<sup>5</sup>

THE DECISION 6, 7, 8, 9

In a prior Determination,<sup>10</sup> OAL concluded that Chapter 7300 of the Department's "Administrative Manual," which establishes state-wide inmate appeal procedures, (1) was subject to the requirements of the Administrative Procedure Act (APA),<sup>11</sup> (2) was a "regulation" as defined in the APA, and (3) therefore violated Government Code section 11347.5, subdivision (a).

Because each of the ten operations plans concerning inmate appeal procedures substantially repeats and re-issues the regulatory provisions of Chapter 7300 of the Department's Administrative Manual, OAL concludes that the ten operations plans (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a), except for certain plan provisions that are either nonregulatory or are restatements of existing statutes, regulations, or case law.

# I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

## Agency

California's first, and for many years only, prison was located at San Quentin. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.<sup>12</sup> The Legislature has thus entrusted the Director of Corrections with a "difficult and sensitive job",<sup>13</sup>

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ." <sup>14</sup>

## Authority <sup>15</sup>

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

## Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), currently provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

In any event, the APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>16</sup> Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.<sup>17</sup>

## General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory, regulatory, and case law history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

### Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations (CCR).

Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"<sup>18</sup> by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations. "The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."<sup>19</sup> Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.

Before turning to a brief overview of the structure of the rules and regulations of the Department, we note that the underlying legal question presented by this Request for Determination regarding the ten operations plans is whether rules issued by wardens and superintendents of particular institutions must in all cases be adopted pursuant to the APA.

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," currently about 200 CCR pages.

The second tier consists of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules. The Manuals are the Classification Manual, the Departmental Administrative Manual, the Case Records Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, and the Parole Procedures Manual-Felon.<sup>20,21</sup> Manuals are updated by "Administrative Bulletins," which typically include replacement pages for modified manual provisions.

Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural

manuals and in institution operational plans and procedures." [Emphasis added.]<sup>22</sup>

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

"[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

. . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy. . . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations.<sup>23</sup> We will simply refer to the documents here at issue as "operations plans."

The third tier of the regulatory scheme thus consists of hundreds (perhaps thousands) of these "operations plans,"

drafted by individual wardens and superintendents and approved by the Director. These plans often repeat parts of statutes, Director's Rules, and procedural manuals.<sup>24</sup>

These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

"Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Another duly-adopted regulation ("first tier enactment") explicitly instructs wardens to provide an inmate appeals system. Title 15, CCR, section 3003 provides in part:

"Every person under the jurisdiction of the [Department] has the right to appeal decisions, conditions, or policies affecting his or her welfare. Each warden, superintendent, and parole region administrator must provide a system whereby an inmate or parolee may request and receive administrative review of any problem or complaint. . . ." [Emphasis added.]

#### Background: Legislative and Judicial Actions

In the 1970's, efforts were made to require the Department to follow APA procedures in adopting its regulations. The first effort to attain this goal through the legislative process passed the Assembly in 1971, but failed to obtain the approval of the Senate Finance Committee.<sup>25</sup> A two-pronged effort followed. Another bill was introduced;<sup>26</sup> the Sacramento Superior Court was asked to order the Department to follow APA procedures. Both efforts initially succeeded. The court ordered the Department to comply with the APA; both houses of the Legislature passed the bill. However, while the bill was on Governor Reagan's desk in 1973, the California Court of Appeal overturned the trial court decision.<sup>27</sup> Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill<sup>28</sup> passed the Legislature and was approved by Governor Brown.<sup>29</sup> In passing this third bill, the Legislature set a deadline for the Department to place its regulations in the APA:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections

. . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.]<sup>30</sup>

Prior to the July 1, 1976 deadline, the Department adopted the Director's Rules, the first tier of the regulatory scheme, into the CCR. In subsequent years, court decisions have struck down portions of the second tier--the Classification Manual<sup>31</sup> and parts of the Administrative Manual<sup>32</sup>--for failure to comply with APA requirements.<sup>33</sup>

Did the Legislature intend, however, that third tier materials, the operations plans issued by particular wardens or superintendents to be applied to particular institutions, be generally subject to APA procedures? We conclude that the answer to this question is "no." In reaching this conclusion, we rely primarily on two factors: (1) the long-established legal line of demarcation between "the rules or regulations of the Department" and rules applying only to one particular institution and (2) the legally absurd consequences of deeming the APA to apply to local rules.

(1) Line of demarcation between statewide and institutional rules.

California courts have long distinguished between statewide rules and rules applying solely to one prison.<sup>34</sup> In American Friends Service Committee v. Procunier,<sup>35</sup> the case which overturned a trial court order directing the Department to adopt its "rules and regulations" pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are distinguished from the institutional rules enacted by each warden of the particular institution affected." [Emphasis added.]<sup>36</sup>

Procunier is especially significant because it was this case which the Legislature in essence overturned by adopting the 1975 amendment to Penal Code section 5058 which made the Department subject to the APA. The controversy was over whether or not the Director's Rules, i.e., the rules "promulgated by the Director" (emphasis added), were subject to APA requirements.

This dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as Hillery v. Rushen (1983). The Hillery court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the

wardens and superintendents of individual institutions the power to devise particular rules applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue were (1) adopted by the Director of the Department of Corrections and (2) are of general applicability." [Emphasis added.]<sup>37</sup>

## (2) Legally Absurd Consequences

Requiring third tier ("local") rules to be adopted pursuant to the APA would have absurd consequences. Wardens would have to go through the public notice and comment process prior to, for instance, establishing or modifying rules setting hours during which meals are served! While, as noted in prior Determinations,<sup>38</sup> departmental decisions on statewide matters often have major fiscal and policy consequences, local administrative decisions are, for the most part, much less significant. Requiring full-bore APA procedures for these myriad decisions would seriously undercut the individual warden's ability to carry out his or her legal duties. Requiring the Department to adopt statewide rules pursuant to the APA was a controversial legislative policy decision, from which many legislators dissented. Had the members been informed that local rules would also be subject to APA adoption requirements, it is likely the bill would not have passed.

## Background: The Origin of this Request for Determination

On November 16, 1987, Donald W. Crisp ("Requester"), an inmate at the California Medical Facility - Vacaville ("CMF"), filed an earlier Request for Determination with OAL challenging: (1) Chapter 7300 of the Department's Administrative Manual ("second tier" rules pertaining to "Inmate/Parolee Appeal Procedure"), and (2) CMF's Operations Plan No. 126 ("third tier" rules pertaining to "Inmate Appeals Procedure"). That earlier Request, Docket No. 87-022, was considered by OAL and ultimately resulted in the issuance of 1988 OAL Determination No. 16 in September, 1988.<sup>39</sup>

In connection with this earlier Request for Determination, Docket No. 87-022, the Requester on May 3, 1988 submitted copies of operations plans governing inmate appeal procedures from ten other institutions. The Requester submitted these ten operations plans as amendments to his earlier Request, Docket No. 87-022, and requested that OAL review them along with CMF's Operations Plan No. 126 in considering that Request. This attempted amendment of the earlier Request was denied; however, these ten operations plans concerning inmate appeal procedures were accepted as a new Request for Deter-



mination, Docket No. 88-004.

It is this second Request, concerning the ten operations plans, which is at issue in this Determination. The ten operations plans challenged in this Determination are, altogether, 254 pages in length.

On November 18, 1988, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.<sup>40</sup>

Background: Chapter 7300 of the Department's Administrative Manual and Earlier Determinations Involving Chapter 7300

Chapter 7300 of the Department's Administrative Manual, "Inmate/Parolee Appeal Procedure," sets forth a detailed set of rules pertaining to inmate/parolee appeals of Departmental decisions and actions which impact inmates/parolees. Chapter 7300 describes, among other things, the three levels of appeal, the appeal screening procedure, emergency appeals, and disciplinary action appeal procedures. Chapter 7300 states that the appeal procedures have been established for the purpose of:

- "1. Providing a vehicle for review of departmental policies, procedures, practices, conditions, incidents, and actions which may adversely affect an inmate's or parolee's welfare, status or program.
- "2. Providing for the resolution of grievances at the lowest possible level with a timely response to the appellant.
- "3. Affording the successful grievant a meaningful remedy focused on correcting the problem.
- "4. Auditing the internal processes and operation of the department, to identify, modify or eliminate practices which may not be necessary or may impede the accomplishment of correctional goals ...."<sup>41</sup>

As discussed in detail below, each of the ten operations plans at issue in this Determination substantially repeats and re-issues the detailed appeal procedure rules of Administrative Manual Chapter 7300 at the "local" institution level.

Administrative Manual Chapter 7300 has been the subject of two prior Determinations.<sup>42</sup> The first Request challenging Chapter 7300 was filed with OAL by Patrick Thomas O'Connell, an inmate at Folsom State Prison, on June 30, 1987. Mr. O'Connell alleged that a substantial number of the rules contained in Chapter 7300 were "regulations" within the meaning of Government Code section 11342, subdivision (b),

and therefore were required to be adopted pursuant to the APA.

In April, 1988, OAL issued 1988 OAL Determination No. 6 in response to Mr. O'Connell's Request. In that Determination OAL found that Chapter 7300 of the Administrative Manual was a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore was in violation of Government Code section 11347.5, subdivision (a), because it had not been adopted in accordance with the APA.

The second prior Determination concerning Chapter 7300 involved the earlier Request for Determination, Docket No. 87-022, filed by Donald W. Crisp. As mentioned above, that Request concerned: (1) Chapter 7300 of the Administrative Manual, and (2) CMF's Operations Plan No. 126 concerning "Inmate Appeals Procedure."

In September, 1988, OAL issued 1988 OAL Determination No. 16 in response to Mr. Crisp's earlier Request. OAL reiterated the conclusion it had reached previously (in 1988 OAL Determination No. 6) that Chapter 7300 was a "regulation" and was in violation of Government Code section 11347.5 because it had not been adopted pursuant to the APA. Furthermore, OAL held that CMF's Operations Plan No. 126, because it was virtually identical to Chapter 7300, was also a "regulation" and was also in violation of section 11347.5, except for a small number of plan provisions which were either nonregulatory, or were restatements of existing statutes, regulations, or case law.

## II. DISPOSITIVE ISSUES

There are two main issues before us:<sup>43</sup>

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or

standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

As noted above, OAL has previously determined (applying this two-part definition of "regulation") that Chapter 7300 is a "regulation" in violation of the APA.<sup>44</sup> The question thus arises: can an individual warden or superintendent subsequently re-issue the provisions of Chapter 7300 without violating the APA? This same question was answered by OAL in another determination, 1988 OAL Determination No. 13.<sup>45</sup> In that Determination, OAL reasoned:

"As noted above, both the Hillery and the Faunce court struck down chapter 4600 of the Administrative Manual as violative of the APA. The question thus arises: can an individual warden subsequently re-issue parts of Chapter 4600 without violating the APA? This was the question faced by the Alcala court, as noted above. The Alcala

court ruled as follows, in an order dated December 20, 1984:

'IT IS HEREBY ORDERED that respondents, their agents or employees are hereby enjoined from enforcing any of the provisions contained in Chapter 4600 of the Department of Corrections' Administrative Manual, or any institutional procedures or parts thereof based upon Chapter 4600 at any of the facilities under its jurisdiction; provided that respondents may continue to enforce Chapter 4600 for thirty days if within that time the warden or superintendent at each facility reviews and revises the institution order governing the possession of property independent of any consideration of terms of Chapter 4600.' [Emphasis added.]

"We find the Alcala court's reasoning persuasive. We acknowledge that there appears to be a controversy over whether actions by the court in 1988 concerning settlement of the basic dispute at San Quentin may have had the result of terminating the injunction binding the other institutions. Assuming arguendo that the injunction is no longer in force, we are nonetheless faced with the necessity of resolving the question of the legality of the Chapter 4600 "clones" now under review. Applying the principle of stare decisis,<sup>46</sup> we find no compelling reason to depart from the even-handed disposition rendered by the Alcala court.

"Indeed, several factors lead us to conclude that we should follow Alcala:

(1) The Department lists the Alcala injunction as a 'reference' citation for Title 15, CCR, section 3190, a regulation concerning local inmate property rules. The 'note' following the regulatory text reads:

'Authority Cited: Section 5058, Penal Code. Reference: Sections 2601(c)(2) and 5054, Penal Code; and in re Alcala, Marin County Superior Court, No. 117925, December 20, 1984.' [Emphasis added.]<sup>47</sup>

(2) Based on the record before us, Chapter 4600 has been neither rescinded nor codified by the Department. The Administrative Manual pages comprising Chapter 4600 have not been removed from the Manual. Neither has an Administrative Bulletin been issued instructing departmental staff to disregard Chapter 4600. Further, Chapter 4600 has not been adopted pursuant to the APA.

(3) Based upon language contained in the CCR and in the Administrative Manual, individual wardens are under clear instructions to conform local rules closely to departmental procedural manuals, including Chapter 4600 of the Administrative Manual.

(4) The record does not confirm that institutions under the Department's jurisdiction have complied with the 1984 Alcala order that they 'revise[] [each] institution order governing the possession of property independent of any consideration of the terms of Chapter 4600.'

(5) As demonstrated in note 54 [footnote omitted], sections M, N, P, S and T, are virtually identical to invalidated Administrative Manual sections 4612, 4614, 4615, 4640, and 4641. [Footnote omitted.] Five months after the Alcala order quoted above, the Faunce court--apparently unaware of the Alcala order--struck down Chapter 4600 again . . . ."

Some of the critical factors noted above (in 1988 OAL Determination No. 13) apply to the matter currently before us:

1. Based on the record before us, Chapter 7300 has been neither rescinded nor codified by the Department.<sup>48</sup> Chapter 7300 has not been removed from the Manual. An Administrative Bulletin has not been issued instructing departmental staff to disregard Chapter 7300. Further, Chapter 7300 has not been adopted in accordance with the APA.

2. Based upon language contained in the CCR and in the Administrative Manual, individual wardens and superintendents are under clear instructions to conform local institutional rules closely to departmental procedural manuals, including Chapter 7300 of the Administrative Manual.

In 1988 OAL Determination No. 13, we found the Department's re-issuance at the "local" level, of a provision of a statewide procedural manual that had been judicially determined to be regulatory in nature, violated Government Code section 11347.5. Here, we are confronted with an earlier administrative determination that a provision of a statewide procedural manual is regulatory in nature. We again conclude that the Department's re-issuance of this same regulatory statewide enactment (i.e., Chapter 7300) at the "local" level (i.e., the ten operations plans) violates Government Code section 11347.5. The Department cannot shield its rules or standards of general application from the scrutiny of the APA by re-issuing them as "operations plans" of individual institutions.

The ten operations plans here at issue are in large part "clones" of Chapter 7300. The operations plans are not identical to Chapter 7300; however, each of the ten operations plans does substantially repeat and re-issue the regulatory provisions of Chapter 7300. The following are four examples of the numerous regulatory provisions found in Chapter 7300 and repeated and re-issued in the operations plans:<sup>49</sup>

EXAMPLE NO. 1: "Appeal Screening Procedure":

Chapter 7300 of the Department's Administrative Manual includes section 7308, "Appeal Screening Procedure."<sup>50</sup> Section 7308 provides the following:

"(a) In order to maintain the efficiency of the appeal procedure, the appeals coordinator, district administrator, or another staff member as delegated, will screen all appeals prior to acceptance and assignment for review. This discretionary decision should not be construed in any manner that would place unreasonable restraints on the inmate's or parolee's right to appeal.

"(b) Discretion may be used in refusing to accept a given appeal for any of the following specific reasons:

(1) The action or decision being appealed is not within the jurisdiction of the Department of Corrections.

(2) The inmate or parolee has resubmitted another appeal on an action or decision currently under appeal review at any level, or on which the appeal action has been previously completed.

(3) The inmate or parolee is appealing an anticipated action or decision.

(4) The inmate or parolee has not attempted to resolve the problem informally prior to filing the appeal and the appeals coordinator has determined that the inmate or parolee can and should do so.

(5) The CDC Form 602 has not been adequately completed or the needed documents have not been attached. Example include: Insufficient information, no action requested, form not signed, or CDC 115 or chronos not attached. Extreme caution will be exercised not to screen out appeals submitted by inmates or parolees who have difficulty in expressing themselves in writing or whose primary language is not English.

(6) There has been too great a time lapse between when the action or decision occurred and when the appeal was submitted. The appeals coordinator will be guided by Section 7302 and, in addition, make sure that the inmate or parolee had, in fact, the opportunity to file in a timely manner.

(7) When a group of inmates have collectively initiated individual appeals on the same issue, thereby placing a burden on the appeals system (see Section 7307, Multiple Appeals, subsection (c)).

(8) An inmate or parolee may not appeal on behalf of another inmate or parolee.

"(c) When it is determined that an appeal will not be accepted for review, the appeals screening form CDC Form 695, Rev. 5/83, will be completed, attached to the CDC Form 602, and returned to the inmate or parolee. Clear instructions on information needed or appeal route to be taken will be stated.

"(d) The screened out appeal will first be logged in on CDC Form 645, given an appeal number, and then logged out, and returned to inmate/parolee, noting the date of the transaction with a number keyed to the reason for the action for future identification purposes.

"(e) . . . ."

Each of the ten operations plans here at issue substantially repeats and re-issues this "Appeal Screening Procedure" section of Chapter 7300 of the Department's Administrative Manual.<sup>51</sup> For instance, Operational Procedure No. 36 for the State Prison - Kings County at Avenal provides as follows at section VI.F:

"1. In order to maintain the efficiency of the appeal procedure, the Appeals Coordinator, or another staff member as delegated, will screen all appeals prior to acceptance and assignment for review. This discretionary decision should not be construed in any manner that would place unreasonable restraints on the inmate's right to appeal.

"2. Discretion may be used in refusing to accept a given appeal for any of the following specific reasons:

a. The action or decision being appealed is not within the jurisdiction of the Department of Corrections.

b. The inmate has resubmitted another appeal on an action or decision currently under appeal review at

any level, or on which the appeal action has been previously completed.

c. The inmate is appealing an anticipated action or decision.

d. The inmate has not attempted to resolve the problem informally prior to filing the appeal, and the Appeals Coordinator has determined that the inmate can and should do so.

e. The CDC Form 602 has not been adequately completed or the needed documents have not been attached. Examples include: Insufficient information, no action requested, form not signed, or CDC-115 or chronos not attached. Extreme caution will be exercised in not screening out appeals submitted by inmates who have difficulty in expressing themselves in writing or whose primary language is not English.

f. There has been too great a time lapse between when the action or decision occurred and when the appeal was submitted.

g. When a group of inmates have collectively initiated individual appeals on the same issue, thereby placing a burden on the appeals system.

h. An inmate may not appeal on behalf of another inmate.

"3. When it is determined that an appeal will not be accepted for review, the Appeals Screening Form, CDC Form 695, will be completed, attached to the CDC Form 602, and returned to the inmate. Clear instructions on information needed or appeal route to be taken will be stated.

"4. The screened out appeal will first be logged in on CDC Form 645, given an appeal number, logged out and returned to the inmate, noting the date of the transaction with a number indicating the reason for the action and for future identification purposes.

"5. . . ."

EXAMPLE NO. 2: "Abuse of the Appeal Procedure":

Chapter 7300 of the Department's Administrative Manual includes section 7309, "Abuse of the Appeal Procedure."<sup>52</sup> Section 7309 provides the following:



"(a) The appeals coordinator has the discretion to take the following actions when it has been determined that the procedure is being subjected to abuse:

(1) If the same person submits a large number of appeals within a short time frame, thereby overloading the system and threatening the orderly and timely processing of appeals, the first appeal will be accepted, the others logged and set aside with no action taken. The appeals coordinator may consult with the chief, appeals section, to determine if a letter of instruction to the inmate should be prepared.

(2) Knowingly making false or slanderous statements may result in a disciplinary charge under Director's Rule 3021, Falsification of Records and Documents.

(3) Appeals, containing gross derogatory or obscene statements may be rejected with the additional option of filing a disciplinary charge under Director's Rule 3004, Rights and Respect of Others.

(4) If the nature of the appeal problem and action requested is not understood or is obscured by the volume of attached material, the appeal may be rejected with instruction to the inmate for written clarification and that additional comments be summarized on one page and resubmitted.

(5) If the person filing an appeal then refuses to cooperate in the appeal investigation through refusing to be interviewed or comply with the letter of instruction, the appeals coordinator may then cancel the appeal noting the behavior on the appeal form and returning it to the sender."

Each of the ten operations plans here at issue substantially repeats and re-issues this "Abuse of the Appeal Procedure" section of Chapter 7300 of the Administrative Manual.<sup>53</sup> For instance, Operational Procedure No. 250 for the Correctional Institution - Tehachapi provides as follows at section VI.T:

"1. The appeals coordinator has the discretion to make the following actions when it is determined that the procedure is being subjected to abuse:

a. If the same person submits a large number of appeals within a short time frame, thereby overloading the system and threatening the orderly and timely processing of appeals, the first appeal will

be accepted, the others logged and set aside with no action taken.

b. Knowingly making false or slanderous statements may result in a disciplinary charge under Director's Rule 3321, Falsification of Records and Documents.

c. Appeals containing gross, derogatory or obscene statements may be rejected with the additional option of filing disciplinary charges under Director's Rule 3004, Rights and Respect of Others.

d. If the nature of the appeal problem and action requested is not understood or is obscured by the volume of attached material, the appeal may be rejected with instructions to the inmate for written clarification and that additional comments be summarized on one additional page and resubmitted.

e. If the person filing an appeal then refuses to cooperate in the appeals investigation through refusing to be interviewed or comply with a letter of instruction, the appeals coordinator may then cancel the appeal noting the behavior on the appeal form and returning it to the sender."

EXAMPLE NO. 3: "Emergency Appeals":

Chapter 7300 of the Department's Administrative Manual includes section 7315, "Emergency Appeals."<sup>54</sup> Section 7315 provides the following:

"(a) An emergency appeal is defined as a matter regarding which disposition according to the regular time limits would subject the inmate/parolee to a substantial risk of personal injury, or cause other serious and irreparable harm to the inmate/parolee. Examples include but are not limited to:

(1) The need for protective custody;

(2) A decision to transfer the inmate to an institution housing a known identified enemy, or;

(3) Request for review of a serious disciplinary action in which good time credits were taken and the inmate had an imminent parole date.

"(b) The inmate/parolee will substantiate in writing the need for emergency handling of the appeal and send it directly to the appeals coordinator, who in turn will determine whether an emergency exists and so inform the

inmate/parolee. If not accepted as an emergency appeal, the appeal will be returned to the inmate/parolee for informal resolution or accepted for regular formal processing.

"(c) When accepted as an emergency appeal, the appeals coordinator or designee will interview the inmate/parolee and a second level response will be completed within five working days.

"(d) If the inmate then requests a director's level review, the appeals coordinator will facilitate the transmitting of the appeal, Attention: chief, appeals section. The director's decision will be based on a review of the written data submitted, and will be completed within five working days of receipt."

Eight of the ten operations plans here at issue substantially repeat and re-issue this "Emergency Appeals" section of Chapter 7300 of the Department's Administrative Manual.<sup>55</sup> For instance, Operational Procedure No. 036 for the Sierra Conservation Center - Jamestown provides as follows at section VI.J:

"1. An emergency appeal is defined as a matter regarding which disposition according to the regular time limits would subject the inmate to a substantial risk of personal injury, or cause other serious and irreparable harm to the inmate. Examples include but are not limited to:

- a. The need for protective custody;
- b. A decision to transfer the inmate to an institution housing a known identified enemy; or,
- c. Request for review of a serious disciplinary action in which good time credits were taken and the inmate had an imminent parole date.

"2. The inmate will substantiate in writing the need for emergency handling of the appeal and send it directly to the Appeals Officer, who in turn will determine whether an emergency exists and so inform the inmate. If not accepted as an emergency appeal, the appeal will be returned to the inmate for informal resolution or accepted for regular formal processing.

"3. When accepted as an emergency appeal, the Appeals Officer or his designee will interview the inmate and a second level response will be completed within five working days.

"4. If the inmate then requests a Director's level review, the Appeals Officer will facilitate the transmitting of the appeal; Attention Chief, Appeals Section. The Director's decision will be based on a review of the written data submitted, and will be completed within five working days of receipt."

EXAMPLE NO. 4: "Expedited Hearing Procedure Review":

Chapter 7300 of the Department's Administrative Manual includes section 7331, "Expedited Hearing Procedure Review."<sup>56</sup> Section 7331 provides the following:

"(a) Prior to the Serious disciplinary hearing or a segregation placement classification hearing, an inmate may request to appeal:

- (1) The denial to have access to confidential material;
- (2) The denial to be assigned a staff assistant;
- (3) The denial to have witnesses at the hearing.

"(b) The appeals coordinator may reject the appeal on the basis of it being an action not yet taken, or accept the appeal for an immediate one-step second level review. Acceptance of the appeal for this expedited second level review would be based on the judgment that an eventual reversal of the decision at the second or third level would entail a costly and time-consuming repetition of a required process.

"(c) This expedited appeal cannot be appealed to the director's level. At the conclusion of the disciplinary or classification hearing, the inmate may, if dissatisfied, then use the regular appeal procedure."  
[Original Emphasis.]

Each of the ten operations plans here at issue substantially repeats and re-issues this "Expedited Hearing Procedure Review" section of Chapter 7300 of the Department's Administrative Manual.<sup>57</sup> For instance, Operational Procedure No. 317 for the Correctional Center - Northern/Coastal Camps provides as follows at page 9:

"Prior to the serious disciplinary hearing or a segregation placement classification hearing, an inmate may request to appeal:

- (1) The denial to have access to confidential material.

(2) The denial to be assigned a staff assistant.

(3) The denial to have witnesses at the hearing.

"The Appeals Coordinator may reject the appeal on the basis of it being an action not yet taken, or accept the appeal for an immediate one-step second level review. Acceptance of the appeal for this expedited second level review would be based on the judgement that an eventual reversal of the decision at the second or third level would entail a costly and time-consuming repetition of a required process.

"This expedited appeal cannot be appealed to the Director's level. At the conclusion of the disciplinary or classification hearing, the inmate may, if dissatisfied, then use the regular appeal procedure."

These examples clearly demonstrate that each of the ten operations plans substantially repeats and re-issues at the "local" institution level regulatory provisions from Chapter 7300 of the Administrative Manual.<sup>58</sup>

WE THEREFORE CONCLUDE, BASED ON OUR ANALYSES, FINDINGS, AND CONCLUSIONS STATED HEREIN AND IN PRIOR DETERMINATIONS, THAT THE TEN OPERATIONS PLANS PERTAINING TO INMATE APPEAL PROCEDURES ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>59</sup>

The internal management exception is applicable to a number of the rules set forth in Administrative Manual Chapter 7300 and then repeated and re-issued in the ten operations plans. For example, section 7310 of Chapter 7300 of the Administrative Manual states:

"(a) Each appeals coordinator will establish an appeals log using CDC Form 645, and assign a log number to each appeal received. In addition to the assigned number, the log will contain the name and number of the inmate or parolee filing the appeal, date received, level of review, name of person designated as the reviewer, due date, date of written notification to inmate on late response, date completed at each level of review, and decision reached.

"(b) . . . .

"(c) At each level of review, the due date will be determined at the time the appeal is assigned. Appeals must be assigned within five days of receipt from the inmate/parolee."

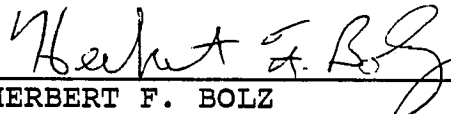
Section 7310 of the Administrative Manual is repeated and re-issued in whole or in part in each of the ten operations plans. Section 7310 relates only to the "internal management" of the Department, and thus the internal management exception applies to the portions of the ten operations plans which merely repeat and re-issue this provision.

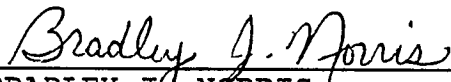
As discussed above, however, under the heading "II. DISPOSITIVE ISSUES," a substantial number of the rules set forth in each of the ten operations plans are standards of general application which implement, interpret or make specific the law administered by the Department. The vast majority of these rules which "mirror" regulatory provisions of Chapter 7300 of the Administrative Manual do not fall within the scope of the internal management exception nor within the scope of any other recognized APA exception.

III. CONCLUSION

For the reasons set forth above, OAL finds that the ten operations plans pertaining to inmate appeal procedures (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a); except for certain plan provisions that are either nonregulatory or are restatements of existing statutes, regulations, or case law.

DATE: February 1, 1989

  
HERBERT F. BOLZ  
Coordinating Attorney

  
BRADLEY J. NORRIS  
Staff Counsel

Rulemaking and Regulatory  
Determinations Unit<sup>60</sup>  
Office of Administrative Law  
555 Capitol Mall, Suite 1290  
Sacramento, California 95814  
(916) 323-6225, ATSS 8-473-6225  
\*Telecopier No. (916) 323-6826\*

e:\s\ldet\89.02

- 1 This Request for Determination was filed by Donald W. Crisp, C-87517, Building 11-120-L, P. O. Box 4000, Vacaville, CA 95696-4000. The Department of Corrections was represented by Marc D. Remis, Staff Counsel, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

To facilitate indexing and compilation of determinations, OAL will henceforth assign consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "19" rather than "1."

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Wheeler v. State Board of Forestry



(1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without any reference to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services recently submitted to OAL (OAL file number 88-1208-02) Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept requirements from administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 59, infra).

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subdivision (a) provides:

"Determination' means a finding by [OAL] as to whether

a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."  
[Emphasis added.]

This and other OAL regulations are indexed in the annual APA/OAL regulations booklet, available at no cost from OAL.

4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30

days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 The ten challenged operations plans are more fully described as follows:

1. California Correctional Center - Northern/Coastal Camps, Operational Procedure No. 317, "Inmate Appeal Procedure" (21 pages in length)
2. California Correctional Institution - Tehachapi, Operational Procedure No. 250, "Inmate Appeals" (16 pages in length)
3. California Institution for Men - Chino, Operations Plan No. 45, "Inmate Appeals" (32 pages in length)
4. California Institution for Women - Frontera, Operations Procedure No. 206, "Inmate Appeal Plan (CDC #36)" (22 pages in length)
5. California Mens Colony - San Luis Obispo, General Order No. 28, "Institutional Inmate Appeal Procedure" (42 pages in length)
6. California State Prison - Kings County at Avenal, Operational Procedure No. 36, "Inmates Appeals" (24 pages in length)
7. Correctional Training Facility - Soledad, Institution Order No. 60, Operational Procedure No. 36, "Inmate Appeals" (27 pages in length)

8. Deuel Vocational Institution - Tracy, Operational Procedure No. 2, "Inmate Appeals" (15 pages in length)
  9. Mule Creek State Prison - Ione, Operational Procedure No. I-A-36, "Inmate Appeals" (34 pages in length)
  10. Sierra Conservation Center - Jamestown, Operational Procedure No. 036, "Inmate Appeals" (21 pages in length)
- 6 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

7 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, no public comments were submitted to OAL. The Department did not submit a Response to the Request for Determination.

- 8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provi-

sion. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

- 9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 19.
- 10 See 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (Chapter 7300 of the Department's "Administrative Manual," concerning inmate/parolee appeal procedures, is a "regulation" required to be adopted in compliance with the APA; however, certain provisions of the chapter are either nonregulatory, or are restatements of existing statutes, regulations, or case law).
- 11 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 12 Penal Code section 5000.
- 13 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
- 14 Penal Code section 5054.
- 15 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity,

Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rule-making agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rule-making agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 16 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal. Atty.Gen. 56, 59 (1956).
- 17 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 18 California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.
- 19 Id.
- 20 As listed in Administrative Manual, chapter 200, section 240, effective 5-18-84.
- 21 The Administrative Manual is approximately 1500 pages in length; the Manuals in toto take up about five to six feet of shelf space.

- 22 This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. SPB ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.
- 23 See Administrative Manual section 242(d).
- 24 The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual," and (3) eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.
- 25 AB 1270(Sieroty/1971).
- 26 SB 1088(Nejedly/1973).
- 27 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
- 28 All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.
- 29 AB 1282(Sieroty/1975).
- 30 Section 3 of Statutes of 1975, chapter 1160, page 2876.
- 31 Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

- 32 Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
- 33 These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5, warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."
- 34 See In re Allison (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); In re Harrell (1970) 2 Cal.3d 675, 698, n. 23, 87 Cal.Rptr. 504, 518, n. 23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); In re Boag (1973) 35 Cal.App.3d 866, 870 n. 1, 111 Cal.Rptr. 226, 227 n. 1 (contrasts "local" with "departmental" rules). See also Department of Corrections, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections and of the particular institution. . . ." Emphasis added.)
- 35 (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
- 36 Id., 33 Cal.App.3d at 257, 109 Cal.Rptr. at 25.
- 37 720 F.2d at pp. 1135-36, n. 2.
- 38 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-82; typewritten version, p. 11 (how inmates are classified); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1685-1686; typewritten version, pp. 4-5 (internal administrative grievance procedure).
- 39 1988 OAL Determination No. 16 (Department of Corrections, September 14, 1988, Docket No. 88-022), California Regulatory



Notice Register 88, No. 39-Z, September 23, 1988, p. 3120.

- 40 Register 88, No. 47-Z, p. 3725.
- 41 Section 7300 of Chapter 7300 of the Administrative Manual (June 6, 1983 version).
- 42 In addition to the Determinations regarding Chapter 7300 of the Department's Administrative Manual, other portions of this Manual were found to be partly non-regulatory and partly regulatory in two prior Determinations. The first Determination concerned sections 7810 through 7817 (governing prison law libraries). See 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, pp. 872-900. The second Determination concerned Chapters 2900 (polygraph examinations) and 6500 (dental services), and section 6144 of Chapter 6100 (inmates' private physicians). See 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, pp. 720-741.

Chapter 4600 of the Administrative Manual, which sets forth detailed provisions governing the amount and type of personal property which prisoners may possess in their cells, was challenged in Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122. The court found that Chapter 4600 must be adopted in compliance with the APA before it could be valid and enforceable. The court relied on the reasoning used by the Ninth Circuit Court of Appeals in Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, which also stated that Chapter 4600 was invalid and unenforceable unless adopted pursuant to the APA. In general, the Hillery court stated that the Director of Corrections must comply with the procedural requirements of the California APA.

- 43 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 44 Neither the facts nor the law have changed since OAL concluded in 1988 OAL Determination No. 6 that Administrative Manual Chapter 7300 was a "regulation" in violation of the

APA. OAL is not aware of any reason which would require us to depart from our prior analysis or conclusion regarding Chapter 7300.

- 45 1988 OAL Determination No. 13 (Department of Corrections, August 31, 1988, Docket No. 87-019), California Regulatory Notice Register 88, No. 38-Z, September 16, 1988, p. 2944.
- 46 Even if the Alcala injunction is no longer in force, the decision of the Marin Superior Court is entitled--even if informally--to some degree of deference, as a case which decided precisely the point at issue here. We note also that both parties were represented by counsel in Alcala.
- 47 Presumably if the Department had concluded that the December 1984 order had been terminated, it would have acted to formally correct the "note" pursuant to the OAL regulation governing "changes without regulatory effect." This regulation, Title 1, CCR, section 100, specifically lists changes to "authority" and "reference" citations as changes typically deemed to be without regulatory effect. OAL must act on these "nonsubstantive change proposals" within 30 days of submission; no public notice or comment is required.
- 48 Chapter 7300 was revised on January 7, 1988; however, it remains substantially unchanged from the June 6, 1983 version that was the challenged rule in both 1988 OAL Determination No. 6 and in 1988 OAL Determination No. 16.
- 49 For purposes of this comparison of Chapter 7300 of the Administrative Manual and the ten operations plans, we refer to the version of Chapter 7300 dated June 6, 1983 (which is 31 pages long). The June 6, 1983 version of Chapter 7300 was the version submitted to OAL by the Requester in connection with his earlier Determination Request, Docket No. 87-022. As stated above, Chapter 7300 was revised on January 7, 1988; however, it remains substantially unchanged from the June 6, 1983 version that was the challenged rule in 1988 OAL Determination No. 6 and in 1988 OAL Determination No. 16.
- 50 Section 7308 was specifically found to be regulatory in 1988 OAL Determination No. 6.
- 51 The specific provisions of each of the ten operations plans which repeat and re-issue section 7308 of the Administrative Manual are the following:

1. Correctional Center - Northern/Coastal Camps, Operational Procedure No. 317, pages 5-6.
2. Correctional Institution - Tehachapi, Operational Procedure No. 250, section VI.B.8.
3. Institution for Men - Chino, Operations Plan No. 45, section VI.I.
4. Institution for Women - Frontera, Operations Procedure No. 206, section VI.H.
5. Mens Colony - San Luis Obispo, General Order No. 28, section VI.F.
6. State Prison - Kings County at Avenal, Operational Procedure No. 36, section VI.F.
7. Correctional Training Facility - Soledad, Operational Procedure No. 36, section VI.F.
8. Deuel Vocational Institution - Tracy, Operational Procedure No. 2, section VI.B.8.
9. Mule Creek State Prison - Ione, Operational Procedure No. I-A-36, section VI.F.
10. Sierra Conservation Center - Jamestown, Operational Procedure No. 036, section VI.D.

52 Section 7309 was specifically found to be regulatory in 1988 OAL Determination No. 6.

53 The specific provisions of each of the ten operations plans which repeat and re-issue section 7309 of the Administrative Manual are the following:

1. Correctional Center - Northern/Coastal Camps, Operational Procedure No. 317, pages 16-17.
2. Correctional Institution - Tehachapi, Operational Procedure No. 250, section VI.T.
3. Institution for Men - Chino, Operations Plan No. 45, section VI.J.
4. Institution for Women - Frontera, Operations Procedure No. 206, section VI.O.12.
5. Mens Colony - San Luis Obispo, General Order No. 28,

section VI.M.16.

6. State Prison - Kings County at Avenal, Operational Procedure No. 36, section VI.G.
  7. Correctional Training Facility - Soledad, Operational Procedure No. 36, section VIII.
  8. Deuel Vocational Institution - Tracy, Operational Procedure No. 2, section VI.T.
  9. Mule Creek State Prison - Ione, Operational Procedure No. I-A-36, section VI.G.
  10. Sierra Conservation Center - Jamestown, Operational Procedure No. 036, section VI.S.
- 54 Section 7315 was specifically found to be regulatory in 1988 OAL Determination No. 6.
- 55 The specific provisions of the eight operations plans which repeat and re-issue section 7315 of the Administrative Manual are the following:
1. Correctional Center - Northern/Coastal Camps, Operational Procedure No. 317, page 15.
  2. Institution for Men - Chino, Operations Plan No. 45, section VI.P.
  3. Mens Colony - San Luis Obispo, General Order No. 28, section VI.L.6.
  4. State Prison - Kings County at Avenal, Operational Procedure No. 36, section VI.M.
  5. Correctional Training Facility - Soledad, Operational Procedure No. 36, section VI.L.
  6. Deuel Vocational Institution - Tracy, Operational Procedure No. 2, section VI.C.
  7. Mule Creek State Prison - Ione, Operational Procedure No. I-A-36, section VI.M.
  8. Sierra Conservation Center - Jamestown, Operational Procedure No. 036, section VI.J.
- 56 Section 7331 was specifically found to be regulatory in 1988 OAL Determination No. 6.

- 57 The specific provisions of each of the ten operations plans which repeat and re-issue section 7331 of the Administrative Manual are the following:
1. Correctional Center - Northern/Coastal Camps, Operational Procedure No. 317, page 9.
  2. Correctional Institution - Tehachapi, Operational Procedure No. 250, section VI.O.
  3. Institution for Men - Chino, Operations Plan No. 45, section VI.V.
  4. Institution for Women - Frontera, Operations Procedure No. 206, section VI.O.2.
  5. Mens Colony - San Luis Obispo, General Order No. 28, section VI.M.2.
  6. State Prison - Kings County at Avenal, Operational Procedure No. 36, section VI.R.
  7. Correctional Training Facility - Soledad, Operational Procedure No. 36, section VII.B.
  8. Deuel Vocational Institution - Tracy, Operational Procedure No. 2, section VI.P.
  9. Mule Creek State Prison - Ione, Operational Procedure No. I-A-36, section VI.R.
  10. Sierra Conservation Center - Jamestown, Operational Procedure No. 036, section VI.L.

- 58 Although most of the provisions of Administrative Manual Chapter 7300 which are repeated and re-issued in the ten operations plans are regulatory, a few of the provisions are merely informational and consequently non-regulatory in nature. For example, the statement of "purpose" contained in section 7300 of the Administrative Manual (quoted on page 27 of this Determination) and repeated in whole or in part in each of the ten operations plans does not constitute a rule or standard of general application but rather is merely informational and non-regulatory.

In addition, some of the provisions of Chapter 7300 which are repeated and re-issued in the ten operations plans are merely restatements of existing statutes, regulations, or case law. For example, a duly-adopted Department regulation (i.e., first tier enactment) relating to "Appeals," section 3003 of

Title 15 of the CCR, provides the following:

"Every person under the jurisdiction of the Department of Corrections has the right to appeal decisions, conditions, or policies affecting his or her welfare. Each warden, superintendent, and parole region administrator must provide a system whereby an inmate or parolee may request and receive administrative review of any problem or complaint. Such reviews will involve upper-level staff and will insure that the complaint receives prompt, courteous and considerate attention.

"(a) Administrators may delay or authorize a delay in implementing decisions or ordered actions affecting an inmate or parolee upon an appeal of the decision or action where the delay will present no threat to institution security, the safety of persons, or create serious operational problems.

"(b) Although department staff members and inmates and parolees are encouraged to attempt informal resolutions of any problem or complaint, a staff member may not participate in the decision process during the formal review of his or her own actions after an appeal is filed.

"(c) There will be no form of reprisal against an inmate or parolee for filing an appeal."

Section 3003 is repeated in whole or in part in Chapter 7300 of the Administrative Manual and in each of the ten operations plans.

The provisions of the ten operations plans which merely repeat existing law (i.e., repeat duly-adopted regulations, statutes, and case law) do not constitute rules of general application adopted by the Department to implement, interpret, or make specific the law enforced or administered by the agency or to govern the agency's procedure. These provisions merely re-state the law already in place and are not "regulations" subject to the requirements of the APA.

Finally, we note that the ten operations plans contain a relatively small number of third tier "local" rules (rules adopted at the institution level and not at the statewide Department level). For example, a number of the operations plans contain provisions which designate the particular staff positions at the institution responsible for hearing certain types of appeals. As stated earlier in this Determination, these third tier rules which are merely adopted at the institution level are not "regulations" required to be adopted pursuant to the APA.